(13)

Office - Supreme Court, U. S.
FILED
MAY 29 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1331

BRUNO ALBERT FREDERICK HEINE,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

GEORGE BOOCHEVER,
ROBERT L. BOBRICK,
Counsel for Petitioner.

TABLE OF CONTENTS

PAGE

PETITION:

A. Summary Statement of the Matter Involved ... 1

A Summary of the Facts ... 3

The Exhibits ... 6

B. Basis of the Court's Jurisdiction ... 6

C. Reasons Relied On for the Allowance of the Writ ... 7

D. Prayer ... 10

BRIEF IN SUPPORT OF PETITION:

I. The Opinions of the Courts Below ... 11

II. Statement of the Case ... 11

III. Specification of Errors ... 11

IV. Argument ... 12

Summary of Argument ... 12

POINT A—Charging the jury from a statute no longer in effect to the prejudice of petitioner is reversible error ... 13

POINT B—The erroneous instruction in effect amended the indictment so as to include another crime in violation of the Fifth Amendment to the United States Constitution ... 17

POINT C—I. Guilty intent may not be inferred from the mere possession of lawful material, and the Circuit Court fell into error in holding to the contrary effect ... 19

II. It is error to hold that a mass of prejudicial evidence was properly received on a matter not an issue in the case ... 19

PAGE

III. Reversible error is practically admitted by respondent when it conceded in the lower Court that Exhibits 2-2a and 31 through 35 were of no significance, yet the Circuit Court ignored the concession and their prejudicial effect by omitting any reference to it in the decision. It also erred when it held that the record does not support the claim that this evidence was taken from petitioner's home without consent or proper warrant 19

POINT D—The Circuit Court erred in upholding the conviction although it was based upon an identification resting wholly upon concurrence of names which under general criminal law is wholly inadequate for purposes of identification 27

CONCLUSION—It is, therefore, respectfully submitted that this Court should grant a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, as prayed for in the petition 29

TABLE OF AUTHORITIES

CASES

	PAGE
Agnello v. U. S., 269 U. S. 20	26
Ayers v. Ratshefsky, 213 Mass. 589, 101 N. E. 78	28
Boyd v. U. S., 116 U. S. 616	26
Brasfield v. U. S., 272 U. S. 448	15
Burns v. U. S., 274 U. S. 328	16
Clyatt v. U. S., 197 U. S. 207	15
Cramer v. U. S., decided Apr. 23, 1945, 13 L. W. 4347, ... S. Ct.	9, 18
Dombroski v. State, 192 Ark. 263, 90 S. W. (2d) 973	15
Douchan v. U. S., 136 F. (2d) 144 (C. C. A. 6), cert. d. 319 U. S. 773	15
Ex Parte Bain, 121 U. S. 1	9, 18
Filippon v. Albion Slate Co., 250 U. S. 76	9, 15
Goldstein v. U. S., 316 U. S. 114	26
People v. Reese, 258 N. Y. 89	28
People v. Rubin, 286 N. Y. 56	28
U.S. v. Atkinson, 297 U. S. 157	15
U.S. v. Cohn, 270 U. S. 339	13
U.S. v. Fawcett, 115 F. (2d) 764 (C. C. A. 3, 1940)	17, 18
U.S. v. Gilliland, 312 U. S. 86	13
U.S. v. J. Greenbaum & Sons, 123 F. (2d) 770 (C. C. A. 2)	16
U.S. v. River Rouge Co., 269 U. S. 411	9, 15
Wiborg v. U. S., 163 U. S. 632	15
Williams v. U. S., 131 F. (2d) 21	14

STATUTES

PAGE

Judicial Code, Sec. 240 (a) as amended by the Act of Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. 936, U. S. C., Title 28, Sec. 347 6

Sec. 35 of the Criminal Code:
Sec. 80, Title 18, U. S. C. 2, 13
C. 194, 40 Stat. 1015 13
C. 587, 48 Stat. 996 ..... 13, 14
C. 69, 52 Stat. 197 13

MISCELLANEOUS

Cardozo, Nature of the Judicial Process, p. 51 16

Constitution of the United States, Fifth Amendment 12

Presidential Proclamation No. 2537, Jan. 14, 1942, F. R. Jan. 17, 1942, Vol. 7, p. 329 9

Regulations of Attorney General, adopted pursuant to Pr. Proc. No. 2537, Jan. 22, 1942, F. R. Feb. 5, 1942, Vol. 7, p. 844 9

Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716 6

Rules for Criminal Appeals, promulgated May 7, 1934, Rule XI (292 U. S. 661, 665, 666) 6

78th Cong. Rec. (73d Cong., 2d Sess.):
Pt. 10, pp. 11270-1 14
Pt. 11, p. 11513 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

BRUNO ALBERT FREDERICK HEINE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES, OF THE UNITED STATES SUPREME COURT:

Your petitioner respectfully shows:

A

Summary Statement of the Matter Involved.

By an indictment, consisting of one count, returned and filed in the United States District Court for the Eastern District of New York on the 5th day of September, 1944, petitioner, an alien of German nationality, was accused that on or about the 10th day of February, 1942, in his

application for a certificate of identification, he "knowingly did falsely and fraudulently state and represent that he had not been a member of or affiliated with, during the then past five years, any club, organization and society, whereas in truth and in fact within said five years he had been a member of and affiliated with the Nationalsozialistiche Deutsche Arbeiter Partei (commonly known as the Nazi Party); all of which was contrary to the form of the statute in such case made and provided, to wit: Section 80, Title 18, U. S. C.,* and against the peace and dignity of the United States" (fols. 14-19).†

Petitioner, after trial, was found guilty and sentenced for a term of eighteen months (fols. 446, 504-507). He appealed his conviction (fols. 508-513) which conviction has been affirmed by the United States Circuit Court of Appeals for the Second Circuit (pp. 198-199).

The Circuit Court of Appeals has stayed its mandate pending the decision by this Court on this petition.

---

* SEC. 80 (Criminal Code, Sec. 35(A)). Presenting false claims. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

† All references are to the printed record and by folio, except in a very few instances and then the reference is to page.

A Summary of the Facts

Petitioner, a man forty-eight years of age, is an alien of German nationality. He came on December 14, 1937, with his wife and child, to live permanently in this country (fols. 476, 478, 479).

In 1914, at the age of eighteen years, petitioner went to work for the North German Lloyd Steamship Company and worked there until he was drafted into the German Army in 1916. After the war, in 1918, he returned to work for the same steamship company as a clerk and remained continuously in their employ until September, 1939. He held the position of financial manager of the advertising department until 1928, when he was assigned to conduct tours for the company and did so until his arrival in the United States in 1937 (fols. 31-35).

While conducting a tour in 1928 he met his wife, a native-born American citizen, for the first time. In 1931 petitioner came to this country and was married in Brooklyn. Husband and wife returned to Germany to live (fols. 34, 35).

In 1937 petitioner and his wife decided that they would prefer to make their permanent home in the United States and to bring up their boy here (fols. 253, 254, 400). Early in 1938 petitioner was re-employed in New York City by the North German Lloyd as a purchasing agent for office supplies, a position which he held until September 30, 1939, when he was discharged (fols. 36-37). As an enemy alien he found the difficulties of getting a new job insurmountable. Having lost the only job he ever had, the petitioner found himself in a desperate position. Exhibits 28, 29-A, 30-A, 36 (fols. 448-474) furnish in bold relief a graphic picture of petitioner's plight and his distraught state of mind. In his desperation he made use of a ruse, namely, an appeal to certain influential individuals that he was a "Party member" (fol. 464). As a result he did get

a minor clerk's job in Fortra, an organization started by three directors of the North German Lloyd for the purpose of sending food packages abroad. In 1941 Fortra was closed and the petitioner found himself out of work again. The petitioner was unemployed for about a year and a half and he was so unemployed when he was interviewed on January 8, 1943, by Special Agent of the F. B. I., Ernest Robert Riddle, Jr. (fol. 38).

The Government, through the witness Buchler, a confessed Nazi held as an internee at Ellis Island, attempted to prove that petitioner was a member of the Nazi Party by having Buchler testify that on a rare occasion when Buchler spoke to petitioner the petitioner had said to him, "I was with the party in Germany," but could not remember the petitioner using the word "member" (fol. 228). This conversation the petitioner denies and denies that he ever spoke to Buchler regarding politics or the Nazi Party, or that he ever told him that he was a member of the Nazi Party (fols. 212, 219, 221, 224, 227, 228).

The Government seized from petitioner's home all the books and magazines containing pictures of Hitler and swastikas and introduced them in evidence. These papers amount to a very small part of petitioner's total library which contained about 1,200 books (fol. 265). Most of the seized material had been sent to the petitioner as a result of his position with a German steamship company (fols. 55, 59).

The Government witness Illian was a stenographer in the German consul's office from March, 1939 to May, 1941. She testified she collected the dues from party members and kept the record of payments (fols. 83, 84, 85). She outlined in great detail how the records were kept. She said Exhibit 24, consisting of seven sheets, typewritten on both sides, was composed by a co-employee and herself and that she composed the last two sheets (fols. 125, 128, 161). She identified the said exhibit as a Nazi Party

membership list. On the back of page 1, after the number 122, is found the name of Bruno Heine. This name was not identified to be that of the petitioner, nor was it connected or associated with the petitioner. It should be observed that although this witness for over two years was at the consul's office collecting membership dues, keeping records, etc., she did not testify that she ever saw the petitioner or that she ever collected any dues from him. This witness further testified that Exhibit 25 was a list of those who were in arrears in their dues (fol. 134). The name "Heine, Brun" appears on this exhibit, but it was never connected or associated with or identified to be the petitioner.

Petitioner denies that he was ever a member of the Nazi Party (fols. 38, 257, 272). The record does give the organizations of which he had been a member. He had been a member of a hiking club, which he had joined when he was twelve or thirteen years old, but had dropped out in 1935 when he saw the Nazis dominating the club (fols. 34, 43). Petitioner had been a member of an advertising club in connection with his work at the steamship company (fol. 41) and it was this membership which brought him magazines and literature with pictures of Hitler and swastikas, some of which he had kept, and these were taken from his house (fols. 55, 59). Petitioner did not join any of the German-American organizations in this country and was not a member of any society or organization (fol. 272).

Petitioner's wife testified (fols. 400, 401) that her husband was not a member of the Nazi Party, either in Germany or in the United States, or affiliated with it in any way.

Responsible citizens came to court and testified, or were ready to testify, to the good reputation of the petitioner for truthfulness. These citizens were Dr. William F. Sunday, pastor of the Church of Good Shepherd in Bay

Ridge, Brooklyn, Dr. Walter M. Howlett of the Division of Christian Education of the Protestant Council, and Mr. John L. Schellenberg, a civil engineer employed for thirty-eight years by the City of New York, and Mrs. Siri Kloving, a member of petitioner's church. The latter two witnesses gave positive testimony as to petitioner's good reputation for truth and veracity (fols. 375-395).

The Exhibits

All the exhibits in the case are respondent's. Exhibits 28, 29-A, 30-A, 36, 37, 38 are set out in full in the record (fols. 448-498). The balance of the exhibits are briefly described in a stipulation at folios 552 through 575 of the printed record.

B

Basis of the Court's Jurisdiction.

This Court may by certiorari have this case certified to it for determination under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 936, Title 28, United States Code, Sec. 347, amending and re-enacting Sec. 240 (a) of the Judicial Code (Appendix to Rules, 306 U. S. 727, 731). Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716, and Rules for Criminal Appeals, promulgated May 7, 1934, Rule XI (292 U. S. 661, 665-666).

The opinion in the Circuit Court of Appeals (pp. 194-198) was rendered April 27, 1945. The judgment and order for mandate was entered May 14, 1945 (pp. 198-199).

C

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided important questions of general criminal law in a way probably untenable, in conflict with the weight of authority and against reason.

(a) It has decided that instructions, *in totidem verbis*, based on a statute long repealed, having no applicability to the charge made against petitioner, and charging a different crime than that set out in the indictment, were favorable to petitioner and "clearly harmless".

If this decision is permitted to stand it establishes a precedent for basing a conviction upon a repealed statute.

(b) It held that the introduction in evidence of certain magazines, books and pins, none of which were contraband (Exs. 1-8, fols. 553-556), is proper to prove "knowledge or wilfulness" to falsify. It is elementary law that a jury may not presume a guilty intent merely from the possession of lawful material.

(c) It held that a mass of irrelevant evidence of a highly prejudicial nature, to wit, Exhibits 10, 10-A through 23, 23-A, 26, 26-A, 27, 27-A (outlined in fols. 557-567, 570-572), was properly admitted in evidence although there was no connection or relationship between the evidence and petitioner. All that this evidence could conceivably tend to prove was the existence of an organization, which was not an issue in the case.

(d) Although the respondent conceded in its brief filed in the Court of Appeals that Exhibits 2, 2-A (outlined in fols. 553-554), 31, 31-A through 35, 35-A (outlined in fols. 573-575) were of no significance, the Circuit Court of Appeals ignored their prejudicial effect to the defense.

It further held that these exhibits were property unlawfully held, when none of them was legally forbidden to petitioner to possess.

(e) It held that petitioner's name appeared on Exhibits 24 and 25 (fols. 569-570), which played an important part in the case. This holding was an assumption without a basis in the record, for there was not even a suggestion of proof that connected the name on the said exhibits to the petitioner. Mere identity of name is not sufficient in a criminal prosecution to show identity of person.

2. The decision of the Circuit Court of Appeals is made in violation of the Constitution of the United States.

The Grand Jury indicted petitioner for one crime, i.e., for making a false statement to a department or agency of the United States. The Trial Court by its instructions to the jury, in effect and for all practical purposes, amended the indictment so as to include another crime, one for which the Grand Jury had issued no indictment, namely, that petitioner was also charged with cheating and swindling or defrauding the Government of the United States or a department thereof of money or property.

The verdict is general and no special finding has been made; it is possible and probable that the conviction of the petitioner rests wholly or in part on the belief of the jury that petitioner was guilty of defrauding the Government, a crime of which he had not been accused before the Grand Jury, for which he was not indicted and as to which no evidence had been offered.

The Fifth Amendment guarantees that one accused of an infamous crime may not be prosecuted except on a true bill returned by a grand jury.

A trial and conviction based upon the charging part of the indictment and upon language first introduced by the Court constitutes a violation of the Constitution and is fundamental error. The petitioner was thereby deprived of

his liberty without due process of law. This Court has so held in *Cramer* v. *United States*, decided April 23, 1945, 13 L. W. 4347, S. Ct. , see note 45.

3. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849, where it was held that a change or an amendment in any manner of the substance to an indictment without resubmission of the case to the grand jury ousts the Court of jurisdiction.

4. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *Filippon* v. *Albion Slate Co.*, 250 U. S. 76, 82, and *U. S.* v. *River Rouge Co.*, 269 U. S. 411, 421, where this Court has held that an erroneous statement of the law in the instructions to the jury is presumptively prejudicial in criminal cases as well as civil cases.

The Circuit Court of Appeals admits that the Trial Court charged the jury from a statute no longer in effect but failed to hold that this erroneous statement of the law was presumptively prejudicial.

5. The petitioner was deprived of a fair trial when the Circuit Court of Appeals failed to give consideration to other prejudicial errors in the charge such as virtually haranguing the jury for a conviction (fols. 441, 442, 443), misstating facts to the jury (fol. 437) and suggesting to the jury what they should conclude from the evidence (fols. 431, 432).

6. The Circuit Court of Appeals has construed regulations having the effect of law in a way contrary to their plain intent.

(a) It has erroneously construed the regulations adopted by the Attorney General on January 22, 1942 (1942, Feb. 5, Fed. Reg. VII, 844), under Presidential Proclamation No. 2537, January 14, 1942 (1942, Jan. 17, Fed. Reg. VII, 329),

as requiring the disclosure of membership in a political party or national organization, here or abroad, during any portion of the then five years preceding the date of registration. By the last clause of Section 6(n)(14) of the Regulations, petitioner was not required to make any statement with respect to membership in any political party, except during such period he spent outside the United States in the five-year period prior to registration date, which required fact respondent failed to prove.

(b) It has erroneously construed the official application form (Ex. 38, fols. 487-497) as requiring information not called for by the questionnaire provided for this purpose. It is upon this erroneous construction that the conviction rests. The questionnaire (item 14) does not require any statement of political party membership by petitioner. Therefore, petitioner was indicted and convicted of a charge which did not constitute a crime.

D

Prayer.

Wherefore, your petitioner has filed the record of the Circuit Court of Appeals in this case and has complied with the rules of this Court in all other respects, and submits that this case merits review by certiorari, and prays that this petition for a writ of certiorari be accordingly granted.

May 28, 1945.

Bruno Albert Frederick Heine,
by George Boochever,
Robert L. Bobrick,
Counsel for Petitioner.